89-1089

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

ATLANTIC RICHFIELD COMPANY,
Petitioner,
vs.
DON VAN VRANKEN,
on behalf of himself and others similarly situated, and
LEW & TED'S SERVICE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED

In order to be free of restrictions imposed by a substantively and procedurally invalid regulation, must a regulated firm either participate in litigation challenging the regulation or obtain the permission of the regulating agency?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner Atlantic Richfield Company ("ARCO"), the respondents Don Van Vranken and Lew and Ted's Service, Inc., and the respondent class of wholesale purchaser–resellers of gasoline, butane, aviation fuels and propane from ARCO between May 1976 and January 1981.

The following companies are subsidiaries of petitioner ARCO (other than wholly–owned subsidiaries):

ARCO Chemical Company

Lyondell Petroleum Company

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The petitioner Atlantic Richfield Company ("ARCO") respectfully prays that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals entered on October 10, 1989.

OPINIONS BELOW

The decision of the Temporary Emergency Court of Appeals was issued as a slip opinion on October 10, 1989, and has not yet been reported. (Appendix A.)

The *Nunc Pro Tunc* June 1, 1988 Order of the United States District Court for the Northern District of California entered September 26, 1988 is not reported. (Appendix B, 10a.)

JURISDICTION

The Temporary Emergency Court of Appeals entered its final decision on October 10, 1989, and denied ARCO's timely motion for rehearing on November 20, 1989. (*See* Appendix C, 27a, Order Denying Rehearing.)

ARCO invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) and section 211(g) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. § 1904 note.

STATUTES AND REGULATIONS INVOLVED

This action involves regulations promulgated by the Department of Energy ("DOE") pursuant to the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 751 *et seq*. The regulation involved, 10 C.F.R. § 212.83(c), and the invalid amendment to that regulation, 39 Fed. Reg. 15139 (May 1, 1974), are reprinted at Appendix D, 28a-29a. The "refiling " regulation cited by the court below, 10 C.F.R. § 212.126(d), is reprinted at Appendix E, 30a.

STATEMENT OF THE CASE

This case involves the effect on regulated firms of a final decision by a controlling court that a federal regulation is invalid on substantive and procedural grounds.

Between 1973 and 1981, the prices of petroleum products were controlled pursuant to regulations promulgated under the ESA and EPAA. The method for calculating the maximum permissible price was based on a formula for allocating crude oil and refining costs among the various petroleum products. *See* 10 C.F.R. § 212.83(c), 39 Fed. Reg. 1924, 1954-56 (Jan. 15, 1974). On April 30, 1974, DOE sought to amend the cost allocation formula without prior notice to affected parties and without considering the factors and objectives set out in the EPAA as a substantive limitation on DOE's rulemaking authority. *See* 39 Fed. Reg. 15139 (May 1, 1974). *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 801-02 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) ("*Mobil I*").[1] This April 1974 amendment to the cost allocation regulations would have prevented regulated firms from fully recovering their increased costs. *See Mobil I*, 610 F.2d at 800 and n. 4; *Mobil Oil Corp. v. DOE*, 678 F.2d 1083, 1085-86 n. 6 (Temp. Emer. Ct. App. 1982) ("*Mobil III*"). The April 1974 amendment was ultimately declared void and invalid on procedural and substantive grounds by the Temporary Emergency Court of Appeals. *Mobil I*, 610 F.2d at 802-04; *see also Mobil Oil Corp. v. DOE*, 647 F.2d 142 (Temp. Emer. Ct. App. 1981) ("*Mobil II*"); *Mobil III*, 678 F.2d at 1088.

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[1] Under the EPAA, DOE was required to consider the following factors and objectives, among others, in formulating regulations: "preservation of an economically sound and competitive petroleum industry . . . economic efficiency; and minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms." EPAA § 4(b), 15 U.S.C. § 753(b)(1); *see Mobil I*, 610 F.2d at 801 n.6.

The Temporary Emergency Court of Appeals has exclusive appellate jurisdiction over cases arising under the ESA and EPAA and, absent review by this Court, its 1979 decision striking down the April 1974 amendment was controlling precedent. ESA § 211, 12 U.S.C. § 1904 note; EPAA § 5, 15 U.S.C. § 754(a). Prior to 1979, ARCO complied with the April 1974 amendment in its cost calculations. Shortly after the April 1974 amendment was struck down, ARCO reallocated its costs in conformance with the pre-existing regulations without obtaining permission from DOE.[2]

In 1979, plaintiffs filed this action pursuant to section 210 of the ESA, 12 U.S.C. § 1904 note, alleging that ARCO had overcharged a class of "wholesale purchaser-resellers " (*see* 10 C.F.R. § 211.51) on purchases of petroleum products. A class of wholesale purchaser-resellers was certified by the district court and plaintiffs' complaint was subsequently amended to include purchases from May 1976 through January 1981.

On June 1, 1988, the district court ruled that ARCO was not entitled to reallocate its costs based on the invalidation of the April 1974 amendment because it was not a party to litigation challenging the amendment and had not obtained DOE's permission to reallocate its costs. (Appendix B, 19a-22a.) The Temporary Emergency Court of Appeals granted ARCO leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and, by decision entered October 10, 1989, affirmed the order of the district court. (Appendix A.)

REASONS FOR GRANTING THE WRIT

The decision of the Temporary Emergency Court of Appeals conflicts in principle with the decisions of other Courts of Appeal in

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[2] The reallocation permitted ARCO to recognize over $100 million in additional increased costs in calculating its maximum permissible prices.

requiring a regulated firm to either participate in a legal challenge to a regulation or seek the permission of the regulating agency in order to be free of the requirements of an invalid regulation. The decision also departs from the accepted course of judicial proceedings and raises important questions regarding judicial supervision of regulatory agencies by creating incentives for duplicative litigation and authorizing regulatory agencies to determine the extent of their compliance with judicial decisions invalidating regulations. Thus, as explained below, ARCO's petition for writ of certiorari should be granted.

I. THE DECISION OF THE TEMPORARY EMERGENCY COURT OF APPEALS REQUIRING REGULATED FIRMS TO EITHER PARTICIPATE IN LITIGATION CHALLENGING A REGULATION OR SEEK LEAVE OF THE REGULATING AGENCY TO AVOID COMPLIANCE ONCE THE REGULATION IS STRUCK DOWN CONFLICTS IN PRINCIPLE WITH DECISIONS OF OTHER COURTS OF APPEAL

Two Courts of Appeal have held that where a regulation is held to be invalid, the regulation is unenforceable as to all persons similarly situated, and not merely as to those who brought the suit attacking it. *See Tallahassee Memorial Regional Med. Center v. Bowen*, 815 F.2d 1435, 1446 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1573 (1988) ("*Tallahassee*") (ruling by controlling court that regulation is invalid is "binding precedent"); *Wirtz v. Baldor Electric Co.*, 337 F.2d 518, 534 (D.C. Cir. 1963). The Temporary Emergency Court of Appeals is the first federal appellate court to reach a contrary result.

In *Wirtz*, the court recognized that invalidating a minimum wage regulation as to only those plaintiffs bringing the lawsuit would give them an "unconscionable " advantage over other firms in the industry. 337 F.2d at 534. Further, the court found that Congress must have intended in authorizing the promulgation of regulations that the

regulations be applied fairly and uniformly to all regulated firms. (*Id.*) In contrast, the decision of the Temporary Emergency Court of Appeals in this case grants an economic advantage to Mobil Oil Corporation as a reward for having brought the lawsuit challenging the April 1974 amendment and punishes Mobil's competitors for failing to bring duplicative actions. (*See* Appendix A, 3a, 8a.)

In *Tallahassee*, the Eleventh Circuit recognized that a decision by a controlling court invalidating a regulation is binding precedent in all subsequent actions and the regulatory agency is powerless to alter that precedent. 815 F.2d at 1446. As recognized by the court in *Tallahassee*, a regulatory agency may in some cases seek to cure a regulatory gap caused by the invalidation of a regulation by adopting a new retroactive regulation. 815 F.2d at 1446-57. In this case, DOE's attempt to retroactively impose a regulation restoring the requirements of the invalid April 1974 amendment was also struck down by the Temporary Emergency Court of Appeals. *Mobil III*, 678 F.2d at 1090-91. Absent adoption of a valid retroactive regulation, DOE lacked the power or authority to enforce the requirements of the invalid April 1974 amendment.[3]

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[3] The decision below relies in part on a regulation regarding "refiling" of cost allocation reports, 10 C.F.R. § 212.126(d). (*See* Appendix A, 6a-8a.) The Temporary Emergency Court of Appeals would authorize DOE to use the refiling regulation to preserve substantively and procedurally invalid regulatory requirements. In contrast, in *Bethesda Hospital Ass'n v. Bowen*, 485 U.S. 399, 108 S. Ct. 1255, 1258 (1988), this Court stated that "submission of a cost report in full compliance with the unambiguous dictates of the . . . regulations does not, by itself, bar . . . claiming dissatisfaction with the . . . regulations."

If the rule of law stated in *Wirtz* and *Tallahassee* is correct and an invalid regulation is void as to all regulated firms, then either the Temporary Emergency Court of Appeals has simply misinterpreted the refiling regulation, or DOE has sought through the refiling regulation to delegate to itself a power which it cannot have -- the power to ignore decisions by the Temporary Emergency Court of Appeals and to impose invalid regulatory requirements on some firms and not others.

The decision of the Temporary Emergency Court of Appeals in this action ignores this fundamental principle of administrative law. The decision would require regulated firms to either participate in every legal challenge to a regulation or engage in the meaningless and time-consuming ritual of obtaining approval of the regulatory agency to conform to the dictates of binding judicial precedent. (Appendix A, 8a.) The decision conflicts in principle with the decisions of other Courts of Appeal and should be reviewed by this Court.

II. THE DECISION OF THE TEMPORARY EMERGENCY COURT OF APPEALS DEPARTS FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND PRESENTS IMPORTANT QUESTIONS REGARDING JUDICIAL SUPERVISION OF REGULATORY AGENCIES WHICH SHOULD BE SETTLED BY THIS COURT

The decision of the Temporary Emergency Court of Appeals departs from the accepted course of judicial proceedings and introduces powerful incentives for regulatory noncompliance and redundant lawsuits. Left unchecked, such incentives will disrupt judicial supervision of regulatory action.

The Temporary Emergency Court of Appeals criticizes ARCO for abiding by the 1974 amendment until it was struck down and failing to file a lawsuit duplicative of the action brought by Mobil. The court states:

> ARCO consistently abided by the April 1974 amendment . . . . Two companies – Mobil and Getty – did not abide by the . . . amendment. Getty applied for and was granted administrative relief. Mobil challenged the validity of the amendment before a panel of this court.
>
> . . . .

> If ARCO believed the 1974 amendment was invalid, the company should have taken steps to protest the regulation rather than attempt to jump on Mobil's coattails [in 1979] five years after the amendment became effective. ARCO could have, like Mobil, challenged the regulation.

(Appendix A, 3a, 8a.) Having abided by the regulation and avoided a redundant lawsuit, the court concludes that ARCO could not cease abiding by the regulation after it was struck down absent permission from DOE. (Appendix A, 6a-8a.) Indeed, under the court's ruling, DOE could have compelled ARCO to continue complying with the invalid regulation since the court finds that "ARCO waived its right to relief by not challenging the regulation in a timely manner." (Appendix A, 8a.)

The decision of the Temporary Emergency Court of Appeals would punish ARCO for its regulatory compliance and reward Mobil for its legal challenge to the regulation by providing Mobil with an advantage over other regulated firms in the industry. Thus, the ruling creates a powerful incentive for regulatory noncompliance and duplicative litigation, and results in the application of invalid regulatory requirements to some firms and not others. In contrast, the accepted rule of administrative law endorsed in *Wirtz* and *Tallahassee* minimizes litigation, treats similarly situated firms equally, and avoids punishing firms for regulatory compliance.

Further, by purporting to allow federal regulatory agencies to decide which firms will be subject to invalid regulatory requirements, the decision would permit federal agencies to determine the extent to which they will comply with judicial decisions invalidating regulatory requirements. Thus, the decision would severely limit the ability of the federal courts to supervise the actions of federal regulatory agencies.

CONCLUSION

An appellate decision encouraging duplicative lawsuits, punishing regulatory compliance, and applying regulations to some firms and not to others based only on the happenstance of which firm filed the original legal challenge is a prescription for regulatory chaos. Only this Court can provide the legal guidance necessary to restore the proper incentives for regulatory compliance and legal restraint and ensure fair and uniform application of regulatory requirements to similarly situated parties. Consequently, ARCO respectfully submits that the Court needs to speak.

Dated: December 20, 1989

Respectfully submitted,

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APPENDIX A

Temporary Emergency Court of Appeals of the United States

No. 9-101

DON VAN VRANKEN, *et al.*,
PLAINTIFFS-APPELLEES,

v.

ATLANTIC RICHFIELD COMPANY,
DEFENDANT-APPELLANT.

Appeal from the United States District Court
for the Northern District of California
(Civil Action No. C-79-0627)

Argued: May 26, 1989 Decided: October 10, 1989

F. BRUCE DODGE, Samuel R. Miller, Theodore P. Senger, Morrison & Foerster, San Francisco, California, were on the brief for Appellant Atlantic Richfield Company.

TRACY R. KIRKHAM and Robert B. Ericson, Hennigan & Mercer, Los Angeles, California, and Josef D. Cooper, San Francisco, California, were on the brief for Plaintiffs-Appellees.

Before: BECKER, WEIGEL, and THORNBERRY, Judges.

THORNBERRY, Judge:

Defendant/appellant Atlantic Richfield Company ("ARCO") appeals the district court's grant of summary judgment in favor of Don Van Vranken, et al. (plaintiffs/appellees), prohibiting ARCO from retroactively reallocating crude oil costs.

FACTS

In 1973, pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. section 1904, *et seq.* ("the ESA"), the

Cost of Living Council ("the CLC") promulgated mandatory price control regulations for all petroleum and petroleum products. These regulations permitted companies to pass along increases in crude oil costs in the price of their petroleum products. The method for calculating the maximum permissible price depended on the nature of the goods. This appeal concerns the calculation of maximum prices for "covered goods" as that term is defined in the regulations.

The CLC established a formula for determining the amount of a refiner's increased crude oil costs that could be attributed to recover goods. This calculation, known as the "V factor," entailed taking the total volume of a given covered good sold and dividing it by the total volume of all covered goods sold. The resulting fraction was used to determine the amount of the increased crude oil costs that could be attributed to the covered product. Refiners had the choice of either increasing the price of the covered goods or banking the increased costs to be used to offset overcharges.

Before the ESA was scheduled to expire on April 30, 1974, Congress passed the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. section 751 *et seq.* ("the EPAA"), to succeed the ESA. Congress, however, exempted certain petroleum products from the price controls under the EPAA. Pursuant to the statute exempting these products, the Department of Energy ("the DOE") issued regulations reflecting the exemption of these products from the price controls. The exclusion of these products from the price controls had a significant impact on the calculation of the permissible price increases for covered goods. Under the new regulations, the increased cost of crude oil used to produce the newly exempt goods was included in the total increased cost of producing covered goods; however, the volume of the newly exempt goods that were sold was not included in the denominator of the V factor. Increased crude oil

costs to produce newly exempt goods could therefore be passed on in the price of non-exempt, covered goods. Effectively, under the new regulations, companies could pass on the increased crude oil costs to produce newly exempt goods in the price of the newly exempt goods themselves and the price of the covered goods.

By emergency regulatory amendment, without providing an opportunity for notice or comment, on April 30, 1974, the DOE redefined the V Factor to add the volume of newly exempt goods to the denominator of the V factor. This amendment resolved the problem created by the post-EPAA regulations and prevented refiners from apportioning increased crude oil costs attributable to exempt goods to the price of their covered products. The result was that only the increased crude oil costs attributable to covered goods could be passed on in the price of covered goods.

ARCO consistently abided by the April 1974 amendment, including allocating increased crude oil in direct volumetric proportion to the covered goods sold. Two companies—Mobil and Getty—did not abide by the V factor provisions in the amendment. Getty applied for and was granted administrative relief. Mobil challenged the validity of the amendment before a panel of this court. In Mobil Oil Corp. v. DOE, 610 F.2d 796 (TECA 1979), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980) (*Mobil I*), a TECA panel found that the 1974 amendment was invalid because DOE failed to provide a period of notice and comment. Later, in Mobil Oil Corp. v. DOE, 647 F.2d 142 (TECA 1981) (*Mobil II*), this court permitted Mobil to reallocate crude oil costs incurred producing exempt goods to the cost of producing covered goods. Following the decisions in *Mobil I* and *Mobil II*, many refiners, including ARCO, sought to retroactively reallocate millions of dollars of increased crude oil costs used to produce exempt products that, ab-

sent the 1974 amendment, could have been attributed to covered products.[1]

In March 1979, the plaintiffs filed suit against ARCO, alleging that ARCO had improperly recalculated its May 1973 costs for crude oil. In determining whether ARCO had in fact overcharged the plaintiffs, the district court had to review ARCO's calculation of its banks of unrecovered costs to determine whether ARCO's banks were sufficient to offset any overcharges. The effect of the invalidation of the April 1974 amendment was critical to determining the amount of ARCO's banked unrecovered costs. ARCO, in a motion for summary judgment, urged that pursuant to the *Mobil* decisions it could retroactively reallocate its costs for producing exempt goods to covered goods and thereby increase its banks. The plaintiffs in their motion for summary judgment, argued that ARCO could not retroactively reallocate these costs. The district court granted the plaintiff's motion for summary judgment.

On Appeal, ARCO urges that (1) in light of the invalidation of the 1974 amendment, it *must* retroactively reallocate its costs from exempt to covered goods; and (2) it *may* reallocate its costs from exempt to covered goods. Several lower courts have addressed these issues and have rejected the arguments ARCO presently advances. *See* Naph-Sol Refining Co. v. Murphy Oil Corp., 550 F.Supp. 297 (W.D. Mich. 1982), *mod'd on other grounds*, sub nom. Mobil Oil Corp. v. DOE, 728 F.2d 1477 (1983), *cert. denied*, 467 U.S. 1255, 104 S.Ct. 3545, 82 L.Ed.2d 849 (1984); Kickapoo Oil Co., Inc. v. Murphy

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[1] The DOE issued further regulations at various points after the April 1974 amendment. Van Vranken urges that these amendments were validly promulgated and that they had the same effect as the April 1974 amendment. We need not reach the validity of these amendments because we find that ARCO cannot retroactively reallocate its costs even absent the amendments.

Oil Corp., No. 78-C-478-C (W.D. Wis. December 28, 1983); Martin Oil Service, Inc. v. Koch Refining Co., No. 81-C-1844 (N.D. Ill. March 21, 1989); U.S. Oil Comp., Inc. v. Koch Refining Company, No. 79-C-659 (E.D. Wis. March 13, 1989).

ARCO'S CLAIM THAT IT MUST RETROACTIVELY REALLOCATE ITS COSTS

ARCO urges that because *Mobil I* invalidated the 1974 amendment the only legal method for allocating increased crude oil costs is to allocate the increased crude oil costs for producing exempt goods to covered goods. For the following reasons, we reject this argument. First, neither *Mobil I* nor *Mobil II required* Mobil to retroactively reallocate costs. Rather, the *Mobil I* panel "permitted . . . Mobil to allocate exempt product costs to covered products." *Mobil I*, 620 F.2d at 805; *see also Mobil II*, 647 F.2d at 146-47 (holding that "the judgment is correct insofar as it permits Mobil to allocate exempt product costs to covered products . . .").

Second, even absent the 1974 amendment, nothing in the regulations required that costs for exempt goods be attributed to covered goods when calculating the maximum allowable price for covered goods. In fact, the relevant regulation stated that "in computing [maximum allowable] prices . . . a refiner *may* increase its May 15, 1973 selling prices . . . by an amount to reflect . . . increased product costs. . . ." 10 C.F.R. Section 212.83 (c)(1) (emphasis added). Nothing in this regulation requires that a refiner bank or increase the price of covered goods to compensate for increased crude oil costs.

Third, there was nothing unlawful about the manner in which ARCO allocated its increased costs. The price ARCO charged for covered goods was within the lawful maximum. *See* Longview Refining Co. v. Shore, 554 F.2d 1006, 1017 (TECA), *cert. denied*, 98 S.Ct. 126, 434 U.S. 836 (1977) (holding that there is no legal wrong if a

plaintiff is charged less than the maximum price). If, absent the 1974 amendment, the regulations required ARCO to allocate the increased costs of producing exempt goods to the price of covered goods, it would be unlawful for ARCO to have failed to allocate the increased costs to the price of the covered goods. No one, including the DOE, has contended that ARCO violated the law.

ARCO'S CLAIM THAT IT MAY RETROACTIVELY REALLOCATE ITS COSTS

Given that there is no support for ARCO's contention that refiners are *required* to retroactively reallocate costs based on *Mobil I* and *Mobil II*, there remains only the question of whether ARCO *may* retroactively reallocate the costs to covered goods. In reviewing this question, two issues arise: first, whether ARCO must obtain permission from the DOE before retroactively reallocating costs; and second, whether ARCO waived any right to retroactive reallocation by failing to timely challenge the 1974 amendment.

ARCO's failure to obtain the DOE's permission to refile

In Eastern Air Lines v. Atlantic Richfield Co., 712 F.2d 1402, 1408-09 (TECA), *cert. denied*, 464 U.S. 915, 104 S.Ct. 278, 64 L.Ed.2d 790 (1983), a panel of this court prohibited ARCO from retroactively reallocating costs to compensate for overcharges. In *Eastern Airlines*, ARCO sought to take costs allocated to gasoline and reallocate them to a specified product group. Under the regulations, ARCO initially had the option of allocating the costs to either gasoline or the product group. We found that, although ARCO initially had the choice where to allocate the costs, the regulations did not permit retroactive reallocation absent permission from the DOE. *Id.* at 1408, n.14. The relevant regulations provide that:

> DOE will routinely accept resubmissions or refiling of [cost allocation] reports only within one year

> after the original filing or submission. Any entry contained in an otherwise timely report which purports to change or adjust retroactively an entry or allocation contained in a report previously filed or submitted shall be considered a refiling or resubmission for purposes of the paragraph and will not be given force or effect absent compliance with the provisions of this paragraph. . . .
>
> Notwithstanding the provisions . . . of this section, a refiner may resubmit or refile reports until June 1, 1979, for months of measurement beginning with September 1973; where expressly authorized by DOE regulation or order; or *where DOE grants written permission to resubmit or refile for good cause shown.*

10 C.F.R. section 212.126(d)(1)-(2) (emphasis added).

In the instant case, ARCO sought, but did not obtain, permission from the DOE to retroactively reallocate costs. As in *Eastern Airlines*, ARCO's failure to obtain permission from the DOE precludes it from any relief by this court.[2]

ARCO attempts to distinguish *Eastern Air Lines* on the grounds that in *Eastern Air Lines* ARCO could choose how to allocate costs while in the instant case only one method for allocating increased costs was available. We do not find this distinction consequential. The central basis of the decision in *Eastern Air Lines* was that ARCO failed to obtain permission from the DOE to retroactively reallocate costs as required by the regulations. The failure to obtain permission from the DOE, not the nature of the initial allocation of costs, determined the outcome in *Eastern Air Lines*. We therefore

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[2] If Arco thought the DOE erred in not granting the company permission to retroactively reallocate its costs, ARCO could presumably have brought an action appealing the DOE's decision.

find the distinction between *Eastern Air Lines* and the instant case immaterial.

ARCO further argues that the above regulations are not relevant in the context of a claim for relief based on the invalidation of a regulation. ARCO urges that because the 1974 amendment was invalid, this court can award relief in the form of retroactive reallocation regardless of the DOE refiling regulations. We disagree. Nothing in the invalidation of the 1974 amendment had any effect on the refiling regulations and nothing in the refiling regulations excepts refiners from compliance when an allocation regulation is invalidated. We thus find that the regulations governing retroactive reallocation are no less effective because the 1974 amendment was invalidated. Had ARCO timely challenged the 1974 amendment as Mobil did, it could have sought relief from the amendment and would have presumably been awarded the relief it now seeks without having to file reallocation reports. Having failed to do so, ARCO cannot avoid the clear language of the regulation requiring permission from the DOE before reallocating costs.

ARCO's failure to timely challenge the regulation

We further find that ARCO waived its right to relief by not challenging the regulation in a timely manner. At oral argument, ARCO suggested that once we declared the 1974 amendment invalid, refiners had an indefinite period in which to retroactively reallocate their costs. This argument is without merit. If ARCO believed the 1974 amendment was invalid, the company should have taken steps to protest the regulation rather than attempt to jump on Mobil's coattails five years after the amendment became effective. ARCO could have, like Mobil, challenged the regulation. The company could have also sought to intervene in Mobil's action, or requested administrative relief as Getty did. Having failed to chal-

lenge the regulation in a timely manner, ARCO is not entitled to relief at this late date.

For the foregoing reasons, we AFFIRM the district court's judgment.

APPENDIX B

FILED
SEP 26, 1988

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DON VAN VRANKEN, on behalf of himself and all others similarly situated, and LEW & TED'S SERVICE, INC.,	No. C-79 0627 SW
Plaintiffs,	ORDER *NUNC PRO TUNC* JUNE 1, 1988, GRANTING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE 'V FACTOR' ISSUE AND GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES
v.	
ATLANTIC RICHFIELD COMPANY,	
Defendant.	

On April 4, 1988, parties made cross-summary judgment motions on the issue of volumetric apportionment, known as the 'V factor.'

The parties also briefed the issue of whether any money sent to plaintiff class members from the Department of Energy pursuant to the Special Refund Proceeding HEF-0591 can be offset against any damages award. After oral argument, the court took the matters under submission. On June 1, 1988, this court filed its ruling which granted partial summary judgment in favor of the plaintiff class represented by Don Van Vranken and denied defendant's motion for summary judgment on the V factor issue. Section II of the order addressed the issue of damages.

After the order was filed, counsel for both parties brought to the court's attention certain typographical errors and mischaracterizations contained in the order. Therefore, this court now files this corrected order *nunc pro tunc* June 1, 1988.

REGULATORY BACKGROUND

Any coherent resolution of this complex and somewhat anachronistic aspect of the petroleum regulations requires at least a brief discussion of the unique background that applies to this case.

In 1974, when the authority to regulate the oil industry passed from the Cost of Living Council to the Federal Energy Office (FEO), the FEO established a cost allocation formula for the oil industry. At that time, authority to regulate the oil industry was derived from two statutes, the Economic Stabilization Act, 12 U.S.C. § 1904 (hereinafter ESA), which controlled the price of most of the goods and services in the nation's economy, and the newly enacted Emergency Petroleum Allocation Act, 15 U.S.C. § 751 (hereinafter EPAA), which controlled the price of crude and refined petroleum products. The FEO formula provided for volumetric apportionment of crude oil costs known as the "V factor." Its purpose was to allocate the total increased crude oil costs among various refined products. The V factor is a fraction. Under the EPAA, the numerator consists of the total volume sold of a particular product in a specified time period. The denominator is the total volume of all "covered products other

than special products" sold in that same period. Among covered products. the refiners could redistribute increased costs from whichever of these products the refiner chose.[1] For the special products, the refiner had to apportion exactly a pro rata share of costs from the refiner's increased costs associated with that special product.

When the ESA expired in 1974, the Department of Energy lost its authority to regulate certain petroleum by-products. However, the ESA expiration did not require the DOE to amend its cost allocation formulas. The successor statute to the ESA, the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 [hereinafter EPAA], exempted certain petroleum by-products which previously fell under the price controls of the ESA.[2] On April 3, 1974, DOE amended the regulations to redefine " covered products." It excluded those products which it no longer had authority to regulate.

Unfortunately, the agency neglected to alter its allocation formulas for the products. To keep the regulations internally consistent, DOE should have included the newly exempted petroleum by-products in the V factor denominator which would have had the effect of excluding their costs from those available for allocation to regulated products. On April 30, 1974, the date the ESA expired, DOE promulgated an amendment to the Mandatory Petroleum Price Regulations which included petroleum by-products in the V factor denominator. 10 C.F.R. § 212.83(c)(2) [hereinafter April 30, 1974

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[1] Alternatively, the refiner could "bank" these increased costs and use them to offset any future overcharges for which the refiner might be responsible.

[2] These products were petroleum coke, petroleum wax, asphalt, road oil and refinery gas. The substances are petroleum by-products, or refinery residue, that result from the processing of crude oil into refined products such as gasoline.

amendment].[3] The upshot of this amendment was that refiners could no longer reapportion to the price of covered products their increased costs attributable to these petroleum goods in any manner they desired. Mobil Oil Corporation was one refiner that made its objections to the amendment known to DOE through administrative remedies. DOE rejected Mobil's protests. Finally, Mobil Oil sued.

DISCUSSION

I. VOLUMETRIC APPORTIONMENT

Don Van Vranken represents the plaintiff class. It has charged ARCO with improperly reallocating exempt products to justify prices it charged the plaintiff class for regulated products. The class claims that up to $343 million of exempt product costs are in excess of the maximum allowed by law.

Four conflicts surface in the cross-motions for summary judgment. First, the parties dispute whether prior litigation between Mobil Oil Corporation and the Department of Energy only provided relief to Mobil based on an injunction which granted Mobil Extraordinary Exception Relief from the V factor regulations after a showing of serious hardship. Second, ARCO believes the voiding of the April 30, 1974 amendment *requires* it to now add exempt product costs to covered product prices. Plaintiff class, however, argues that ARCO's figures amount to illegal retroactive reallocation. Third, plaintiff class contends that if ARCO is allowed to add exempt product costs it is limited to three months – May, June and July 1974 – because three V factor regulations promulgated in August 1974, December 1974 and March 1975 prohibit the allocation of exempt

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[3] The denominator was changed to include "the total volume of all covered products and all products refined from crude petroleum other than covered products. . . ."

product costs to covered product costs. Finally, it must be resolved whether ARCO sought and received permission from DOE to add exempt product costs.

A. Application of the *Mobil* Decisions

Defendant ARCO contends that three decisions by the Temporary Court of Appeals – or TECA – provide an avenue for refiners like ARCO to add the increased costs to the V factor they used. The defendant's interpretation is too broad. These cases, the *Mobil* decisions, do not necessarily apply across the board to all refiners similarly situated.

In *Mobil Oil v. Dep't of Energy*, 610 F.2d 796 (TECA 1979) [hereinafter *Mobil I*], TECA upheld a district court holding and ruled in favor of Mobil. The court held that DOE had failed to consider each of the statutory commands of the EPAA when it promulgated the April 30, 1974 amendment. Thus, the amendment was procedurally invalid. In addition, DOE failed to provide notice and comment to interested parties as usually required by the Administrative Procedures Act, 5 U.S.C. § 553 [hereinafter APA], for informal rulemaking procedures. TECA established that none of the exceptions to the notice and comment requirement applied to DOE. For instance, DOE could not argue that the expiration of ESA came as a surprise. Nor did the agency's forgetfulness provide an excuse. Accordingly, TECA reaffirmed the district court's holding that the amendment was " arbitrary and capricious" and therefore " null and void." *Id.* at 805.

The district court had ruled that Mobil could retroactively allocate increased costs from exempt petroleum by-products " continuously from April, 1974 up to the present [November, 1979]." *Id.* TECA held that a portion of this district court judgment contravened a December 1975 amendment to the EPAA which prohibited any method other than direct proportionate distribution of cost pass-throughs to certain products, including No. 2 heating oil and No. 2 diesel fuel, aviation fuel and propane produced from crude. 15 U.S.C.

§ 753(b)(2)(D). Accordingly, TECA remanded the case for findings consistent with these restrictions.[4] On remand, the district court held that Mobil could reallocate its costs from April 1974, except that from February 1, 1976 forward, the restrictions on products such as No. 2 heating oil applied. Thus, Mobil could allocate exempt product costs to covered products for the period prior to February 1, 1976.[5]

In *Mobil II*, DOE appealed the remanded district court holding. *Mobil Oil Corp. v. Dep't of Energy*, 647 F.2d 142 (TECA 1981). DOE urged that Mobil should not be allowed to reallocate increased crude oil costs from exempt products to covered products after February 1, 1976. TECA agreed, and held that Mobil could reallocate only for the period preceding February 1, 1976. TECA did point out that the *Mobil I* decision did not address the question of whether the later rulemakings, such as the February regulation, validly promulgated the same regulation on their effective dates.

In *Mobil III*, *Mobil Oil Corp. v. Dep't of Energy*, 678 F.2d 1083 (TECA 1982), TECA dealt with DOE's attempted third bite at the apple and the subsequent abolishing of the V factor altogether. On January 16, 1981, DOE adopted a regulation which retroactively repromulgated the April 30, 1974 amendment to the April 1974 date. TECA ruled that DOE could not retroactively repromulgate its rule. The decision in *Mobil I* had made it clear that the April 1974

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[4] *Mobil I* also established that a new rulemaking in September 1974 did not cure the April 30, 1974 amendment problems. First, TECA held that the September statute addressed non-product costs pass-throughs. The April 1974 amendment concerned product cost pass-throughs, so the two were unrelated. Second, TECA noted that an opportunity for notice and comment regarding a subsequent rulemaking cannot cure previous rulemaking defects. *Mobil I*, 610 F.2d at 805 n.11.

[5] The district court used the February 1976 date instead of December 1975 because the December statute directed new regulations to take effect no later than February 1, 1976. 15 U.S.C. § 758.

amendment was not necessary to fulfill the EPAA's design. Thus, a retroactive statute did not fulfill that design. *Id.* at 1090.

In addition, the February 1, 1976 and other subsequent amendments brought in a new cost allocation, the " R factor," for the old V factor.[6] Energy Policy and Conservation Act (EPCA), 5 U.S.C. § 751. TECA ruled that this substitution was prospective enforcement and therefore proper. *Mobil III*, 678 F.2d at 1091.

In accordance with its filing regulations, DOE set up a specific grace period and appeal process to determine whether the agency would accept refilings based on the new invalidation of the April amendment. There was no carte blanche for all refiners to refer to the *Mobil* decisions and increase their costs.

In general, DOE did not allow refiners to refile cost allocation reports that sought to change the allocation of crude oil costs based on the invalidation of the April 1974 amendment unless the refiners applied within the grace period or with the permission of the DOE. The agency noted that, if permitted, the filings could result in total refiner claims for retroactive increases in banked costs of over $50 billion at that time. 45 Fed. Reg. 58,872-73 (Sept. 5, 1980).[7]

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[6] The V factor was based on volume of products sold. The R factor was based on volume of products refined. The V factor was eliminated entirely as of March 1, 1977 in favor of the R factor.

[7] Indeed, DOE prophesied the exact complaint Van Vranken makes here:

> Many (refiners) have claimed that, because the April 30, 1974 rule was declared invalid, their pool of increased costs for the period thereafter can be enlarged, such that alleged violations based on their contemporaneously reported increased costs are either diminished or obliterated.

46 Fed. Reg. 7782 (Jan. 23, 1981). DOE found no good cause to allow this to happen.

The court agrees with the concerns expressed in *Kickapoo Oil Co. v. Murphy Oil Corp.*, No. C 78-478, slip op. at 17-24 (W.D. Wis. Dec. 28, 1983). There, the court concluded that, while DOE could not enforce the invalid regulation against nonparties to the *Mobil* cases, those regulations do not necessarily enable all those who applied the invalid regulation to later seek reallocation of their crude oil costs increases.

The court does not, however, accept the interpretation of the *Mobil* decisions offered by the plaintiff class. It suggests that the scope of the decisions is limited to Mobil Oil Corporation because the holdings provided emergency relief in accordance with an injunction. This is a misreading of the cases. TECA struck down the April 30, 1974 amendment because it did not follow the APA or the EPAA. The court clearly did not reach the issue of whether DOE was justified when the agency turned down Mobil's administrative appeals for emergency relief.

B. Reallocation of Exempt Product Costs

Having held that the *Mobil* decisions do not automatically allow ARCO to reallocate its crude oil costs, this court must next determine whether the April 30, 1974 amendment allows or mandates ARCO add these costs to its covered product prices. The plaintiff class has asked this court to rule that ARCO cannot inject additional increased costs into its banks today when those costs were not contained in contemporaneous filings with the DOE. For the reasons presented below, the court rules in favor of the class.

1. The relevant issues.

ARCO contends that plaintiff class has mischaracterized the nature of the issue presented. The refiner suggests that the question is whether the class can establish that it was in fact overcharged during the applicable time period. In antithesis, the court believes ARCO's approach places the cart before the horse.

ARCO relies on the ruling expressed in *Longview Refining Co. v. Shore*, 554 F.2d 1006 (TECA), *cert. denied*, 434 U.S. 836 (1977). In that case, the court ruled that the customer had not shown that the refiner had failed to implement the price regulations.[8] Here, this court must first determine what the pertinent price regulations require. Then, after applying those regulations, plaintiff class must establish that actual overcharges occurred, by, among other things, showing that ARCO improperly inflated its banked costs used to support prices. *See Kickapoo*, 788 F.2d at 20; *Longview*, 554 F.2d at 1011. Finally, the class must then show that the overcharges or excessive banks were made with the requisite intent and willfulness. *Id.* at 1023.[9]

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[8] Shore complained that Longview Refining charged them too much for gasoline and diesel as allowed under the applicable regulations. TECA struck down the district court's findings of facts and conclusions of law because the facts did not sufficiently support a conclusion that an overcharge occurred. TECA noted that "plaintiffs have the burden in this case to provide the specific data needed to prove the existence of an overcharge." *Longview*, 554 F.2d at 1011. TECA found many aspects of the district court's findings lacking in foundation, including the fact that the district court apparently only used plaintiff's version of the proper pricing structure.

[9] TECA also relied on the absence of a showing of intent in its reversal in *Longview*. The court noted that a § 210 action requires plaintiff to prove that defendants "intentionally charg[ed] a price known to be in excess of the applicable ceiling price allowable under the pricing regulations." *Id.* at 1022-23. Clear proof of willfulness is required because of the complexity of the regulations: The court remarked that these regulations were so convoluted that even the government could not determine how to

Footnote continued on next page.

2. Recovery of exempt product costs.

ARCO urges this court to rule that the refiner must follow the pre-April 30, 1974 definition, that this definition required the recovery of the five later exempted product costs in covered product prices, and the invalidation of the April 30 amendment continued this mandate until February 1, 1976. This cannot be.

Obviously the *Mobil* decisions invalidating the April 1974 amendment establish that a plaintiff cannot sue for over-recoveries which stemmed from a refiner's improper use of this rule. The decisions indicate that correct posture for a refiner in an exogenous world would have been to ignore the amendment and to continue to include the exempt product prices in the denominator of the V factor.[10] Refiners like ARCO, however, followed the amendment and excluded the prices. The fact that the *Mobil* decisions later invalidated the amendment does not mean that ARCO can now go back and allocate more costs to the products it sold and thus expand its banked costs. The court notes that this proposal would be akin to

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properly calculate the pricing structures. The *Longview* court speaks of willfulness "in the criminal sense." Nonetheless, here TECA seems to refer to the accountants' inability to understand what they were supposed to do. It is unclear how TECA would have ruled if the court had found that the refiner understood the regulations but still failed to follow their requirements. Thus, it is not clear that, in the case before this court, the plaintiff class must show ARCO acted with criminal intent. In addition, this problem was not crucial to TECA's analysis; TECA clearly could reverse the district court without relying on this issue. Finally, TECA does warn that "mere failure to employ the formula" is not a "legal wrong." But this proscription provides for the case when the refiner fails to follow the price formulas but still manages to charge the customer less than the price to which the refiner is entitled.

[10] The court does not think it unrealistic that refiners might indeed realize that the EPAA was always intended to remain consistent even after the expiration of its predecessor ESA and keep exempt products and covered products separate.

permitting a refiner to return to its customers after a dozen years had passed and inform them that it undercharged them: The refiner mistakenly operated under a recently invalidated regulation which set the prices too low, so it should now be permitted to ask the customers to pay the difference on products sold and consumed many years ago. Whether the costs are banked for the future or extracted from the customer in the price of today's goods, the result is the same.

The court finds support in the reasons expressed in *Kickapoo* and *Naph-Sol Refining Co. v. Murphy Oil Corp.*, 550 F. Supp. 297 (W.D. Mich. 1982), *modified on other grounds sub nom. Mobil Oil Corp. v. DOE*, 728 F.2d 1477 (TECA 1983). These courts concluded that DOE had indeed set forth an invalid April 1974 amendment. As a result, the amendment was improper, and refiners were to use the old, albeit internally inconsistent, rule which removed EPAA exempt products from the V factor denominator.[11] Thus, the *Mobil* decisions allowed the refiners to use the amendment resulting from the DOE's slip-up. But the refiners were not required to use the amendment at that time. *Id.* As plaintiff class points out, the *Mobil* courts always used permissive language rather than compulsory language when describing Mobil's ability to allocate costs.

The court finds the reasoning in *Kickapoo* particularly persuasive on this point. There, the court noted that the only directives the price regulations ever contained regarding exempt product costs were prohibitions barring their use to justify increasing covered prices. The court interpreted the effect of the invalidation of the April 30 regulation on the cost allocation as a temporary suspension of this prohibition. It follows that this temporary suspension does not automatically compel the addition of exempt product costs to the

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[11] As noted above, the denominator should have included volumes of both covered products and exempt products in order to exclude exempt product costs from allocation to covered product prices. Discussion, *supra*, at 2-3.

covered prices calculation. As recognized in *Kickapoo*, it was never a violation of the regulations to not increase covered product prices in order to recover exempt product costs, even during the period that the April 30 V factor prohibition was void.

It is one thing to allow refiners a pricing practice which violated the spirit of the EPAA but held consistent to the letter when that regulation was in effect. It is a different thing to allow the refiner to retroactively use that inconsistent regulation to its benefit now that the regulation is outdated. Indeed, this reasoning is the underpinning of the decisions in *Tenneco Oil Co.*, 1 DOE § 85,512 (1977), and *Eastern Airlines, Inc. v. Atlantic Richfield Co.*, No. 74-1207 Civ-JM (S.D. Fla., Jan. 12, 1982), *aff'd*, 712 F.2d 1402 (TECA 1983), and points to the root of the persuasiveness of those cases to that here. This court is aware that the subject of those cases was voluntary reallocations of "H factor dollars,"[12] and not recalculation of the V factor, as is the case here. In those cases, the seller chose the amount of costs to assign to particular products and then later sought to reallocate costs to eliminate over-recoveries. The courts refused to allow this practice. The reasoning they expressed counsels against unnecessary retroactive reallocations in general and indicates compelling policy concerns that this court, too, must consider.[13]

Accordingly, this court rejects the suggestion by ARCO that it analogize the case here to that in *Mamula v. Commissioner of Internal Revenue*, 346 F.2d 1016 (9th Cir. 1965). In that case, a taxpayer, in good faith, reported income pursuant to a method which the government determined to be incorrect in a subsequent audit. The court found he was not bound to the method he chose because the IRS

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[12] These reflect the costs allocated into and out of a product group.

[13] Similarly, the *Naph-Sol* court noted that public policy should prohibit letter a seller retroactively adjust its prices in order to benefit itself. 550 F. Supp. at 313.

had ruled that it did not appropriately apply to his income source. The court allowed him to choose one of two other methods available to recalculate the tax; naturally, he chose the system which better benefitted his finances.

That is what ARCO would like to do here: choose between the pre-amendment posture or the April 1974 amendment requirements to achieve the highest banked costs. Yet, in the case before this court, the government has never ruled that a recalculation is required.[14] Furthermore, the concept of volumetric allotment was considered fundamental to the framework of the petroleum regulations. Unlike the law in *Mamula*, the prohibition required by the April 30, 1974 amendment had always been, and later continued to be, the heart of the volumetric regulations. The method of tax payment in *Mamula* never was the appropriate choice for that plaintiff to follow. The fact that he was later allowed to correct his mistake cannot be relevant to ARCO's predicament.

C. ARCO's Revised Cost Forms

Because this court holds that ARCO's recalculation of its V factor constitutes an improper retroactive reallocation of its exempt product costs, the court need not address the issue of the August 1974, September 1974 and March 1975 subsequent rulemakings. Instead, this court must next confront the issue of ARCO's revised cost forms. If ARCO had received permission from the DOE to include the exempt products costs in its covered products costs, or if ARCO ever applied to the DOE during a grace period, it is possible that the refiner might still be allowed to adjust its V factor as it desires. The court determines that ARCO did neither of these things.

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[14] The courts in *Naph-Sol*, 550 F. Supp. at 313, and *Kickapoo*, No. C 78-478, at 21-24, make a similar distinction.

10 C.F.R. § 212.126(d) states that the refiner must obtain DOE's written permission for any refiling that covers a period more than one year prior to the resubmission:

> (1) DOE will routinely accept resubmissions or refiling of such reports only within one year after the original refiling or submission. Any entry contained in an otherwise timely report which purports to change or adjust retroactively an entry or allocation contained in a report previously filed or submitted shall be considered a refiling or resubmission . . . and will not be given force or effect absent compliance with the provisions of this paragraph.
>
> (2) *Exceptions* Notwithstanding the provisions of subparagraph (d)(1) of this section, a refiner may resubmit or refile reports . . . where DOE grants written permission to resubmit or refile for good cause shown.

ARCO did make R factor refilings. ARCO points to three aspects of the R factor revisions to imply it resolved its volumetric apportionment problems with DOE. In a Proposed Remedial Order, ERA No. RARH00204, September 30, 1983, DOE challenged ARCO's R factor adjustments for March 1979 through December 1980. ARCO claims that the PRO specifically declined to challenge or criticize the refiner's V factor adjustment. Actually, the PRO directs nothing to the V factor in the face of the Order. Absence of a discussion does not carry any significance.

ARCO further relies on another inapplicable document. When ARCO applied for the R factor refilings, DOE wrote a response brief. Response of Economic Regulatory Administration to Statement of Objections of Atlantic Richfield Company, No. HRO-0223. At footnote 79, the Response noted that DOE did not challenge the propriety of allocating exempt product costs to all covered products before February 1, 1976. But that remark clearly refers to the TECA

rulings in *Mobil*, not to any such requests specifically made by ARCO. ARCO leaves this distinction out.

Finally, ARCO relies on another footnote, number 77, in the same Response. The DOE noted that, with respect to ARCO's refilings in August 1981, it did not object to " legitimate costs incurred" if ARCO accurately reported them consistent with the regulations. It is clear that DOE is agreeing to nothing more than what ARCO was entitled to by law. This footnote does not take the place of written acceptance of a refiling as required by the statutes. Indeed, as counsel for DOE commented at oral argument, a footnote in a brief could not imply the DOE's acceptance of a refiling.[15]

II. DAMAGES

In 1985, ARCO and DOE settled a number of pending administrative proceedings pursuant to § 211 of the ESA. *See* 50 Fed. Reg. 8366, 8368 (March 1, 1985). As described in the Notice of Proposed Consent Order, upon execution of the settlement:

> ARCO deposited $65.7 million in an interest bearing escrow account pending public consideration of the settlement. If the Consent Order is made final, ERA will petition the Office of Hearings and Appeals (OHA) to implement a Special Refund Proceeding pursuant to 10 C.F.R. Part 206, Subpart V. In that proceeding, any person who claims to have suffered injury from ARCO's alleged overcharges would have the opportunity to submit a refund claim to OHA.

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[15] In supplemental information, ARCO brings up an attempt it made at refiling on March 24, 1982. Apparently, DOE ignored this submission because it was made after the regulations expired and during settlement negotiations in DOE enforcement proceedings. Thus, this too lacks the permission required and lacks "force or effect."

Id. at 8366. Plaintiff class contends that money paid to its members from the Consent Order fund is " collateral" to the treble damages awardable under the class's own private cause of action under § 210. The class also argues that the Consent Order fund is attributable to overcharges which are not currently recoverable in this action. As explained below, such a ruling would permit an excess of recovery to the class members.

First, the DOE settlement pertains to alleged overcharges related to ARCO's compliance with the Mandatory Petroleum Price Regulations during the period of January 1973 through January 1981. The escrow fund is intended to provide restitution to purchasers of ARCO's refined petroleum products during this time. 50 Fed. Reg. at 8371. The Consent Order clearly covers damages claimed in plaintiffs' private cause of action. Indeed, earlier this year, parties signed a settlement agreement regarding the class's § 210 claims with money that would have come from the Consent Order fund.

Second, the collateral source rule provides that " if an injured party received some compensation from a source wholly independent of the tortfeasor, such payments should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Hrnjak v. Graymar, Inc.*, 4 Cal. 3d 725, 729 (1971). Plaintiff class uses this rule to assert that DOE's actions are remedial and therefore have no bearing on any award made in this case. The class cites to *Bulzan v. Atlantic Richfield Co.*, 620 F.2d 278 (TECA 1980). It is correct insofar as the DOE's administrative enforcement action does not affect the class's right to *file and maintain* a private cause of action under § 210. However, *Bulzan* does not stand for the proposition that the class may collect twice from ARCO. Other cases support this conclusion. The court in *U.S. Oil Co., Inc. v. Koch Refining Co.*, 518 F. Supp. 957, 962 (E.D. Wis. 1981), recognized that administrative enforcement actions and separate private actions could expose a defendant to double liability. The court went on to note that this problem is eliminated if courts " reduce any potential exposure by offsetting any amount a particular plaintiff might recover

by way of DOE's actions against any recovery for a private suit. DOE could also offset recoveries in private suits against any restitution order." *See also Martin Oil Service, Inc. v. Koch Refining Co.*, No. C 81-1844, slip op. at 4 (N.D. Ill. Oct. 18, 1982) (where the court suggested the offset problem may be minimized if a defendant who has already paid restitution on a private action may assert this as a defense to an enforcement action by DOE).

The court does agree with the plaintiff class in that the offset should be subtracted from the total amount of damages *after* trebling. In actions like this where treble damages are available, the plaintiff is entitled to full satisfaction of the claim for harm done. The amount awarded as damages is then trebled as punishment to the defendant. If the offset were subtracted from the initial damage award, the class members would be denied the full satisfaction of their claim.

CONCLUSION

This court has held that ARCO's attempts to alter its banked costs constitute an improper retroactive reallocation of its exempt product costs. Accordingly, it grants partial summary judgment to the plaintiff class represented by Don Van Vranken on this issue. ARCO may offset money that would go to these class members from the DOE Consent Order fund against any amount of damages due the members under their private cause of action. The offset will be made after damages are trebled.

IT IS SO ORDERED.

DATED: 9-26-88

/s/
UNITED STATES DISTRICT JUDGE

APPENDIX C

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 9-101

ATLANTIC RICHFIELD COMPANY,
Appellant,

v.

DON VAN VRANKEN, on behalf of himself
and all others similarly situated,
and LEW & TED'S SERVICE, INC.,
Appellees.

Before: BECKER, WEIGEL and THORNBERRY, Judges.

ORDER

Upon consideration of Appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

ORDERED that said petition for rehearing is DENIED.

It is FURTHER ORDERED that the suggestion for rehearing *en banc* is DENIED. The Court's mandate shall issue seven days from the date of this order – Monday, November 27, 1989.

FOR THE COURT:
/s/
Cynthia A. Dykes
Clerk

November 20, 1989

APPENDIX D

Cost Allocation Regulation, 10 C.F.R. § 212.83(c)(2)

(c) Allocation of increased costs

. . .

(2) General Formulae. (i) For special products (i=1 and i=2):

$$di^u = \frac{A^t (Vi^n/V^n) + Bi^t + Gi^t - Hi^u}{Vi^{ui}}$$

(ii) For covered products other than special products (i=3):

$$Di^u = A^t (Vi^n/V^n) + Bi^t + Gi^t + H^u$$

Where for (i) and (ii):

. . .

V^n = The total volume of all covered products sold in the period "n" (the consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month "u").

(39 Fed. Reg. 1955 (Jan. 15, 1974).)

Invalid Amendment to Cost Allocation Regulation, 10 C.F.R. § 212.83(c)(2)

Section 212.83(c)(2) is amended in the definition of "V" to read as follows:

§ 212.83 Allocation of refiner's increased product costs.

. . .

(c) Allocation of increased costs.

(2) General Formulae . . .

V^n = The total volume of all covered products and all products refined from crude petroleum other than covered products sold in the period "n" (the consecutive three-month period of the preceding year such that the middle month of the period corresponds to the current month "u")

(39 Fed. Reg. 15139 (May 1, 1974).)

APPENDIX E

Refiling Regulation, 10 C.F.R. § 212.126(d)

(d) (1) **Resubmissions and refiling of reports by refiners.** A refiner shall exercise due care and diligence in the preparation of cost allocation reports filed pursuant to this section. DOE will routinely accept resubmissions or refiling of such reports only within one year after the original filing or submission. Any entry contained in an otherwise timely report which purports to change or adjust retroactively an entry or allocation contained in a report previously filed or submitted shall be considered a refiling or resubmission for purposes of this paragraph and will not be given force or effect absent compliance with the provisions of this paragraph.

(2) **Exceptions.** Notwithstanding the provisions of subparagraph (d)(1) of this section, a refiner may resubmit or refile reports until June 1, 1979, for months of measurement beginning with September 1973; where expressly authorized by DOE regulation or order; or where DOE grants written permission to resubmit or refile for good cause shown.

(3) **Applications to resubmit or refile.** In any application for permission to resubmit or refile a report pursuant to subparagraph (d)(2), DOE will not make a finding of good cause routinely. Where it appears that such a finding may adversely affect the interest of the consuming public, a firm must demonstrate in its application, at a minimum, that the claimed errors or omissions in the report or reports which the firm seeks to replace or modify did not result from a failure to exercise due care and diligence. Firms must apply for permission pursuant to subparagraph (d)(2), in writing, to the DOE office of Special Counsel for Compliance or Office of Enforcement, as appropriate. Applications to resubmit or refile must be accompanied by a written statement completely describing the proposed adjustments and the reasons therefor, and a numerical

schedule which reflects both the previously submitted figures and the proposed adjusted figures. The appropriate DOE Office will dispose of each application in writing, with a concise statement of the reasons for granting or denying the application. The disposition of such an application shall be subject to appeal as an order, under Subpart H of Part 205.

(44 Fed. Reg. 14536 (March 13, 1979).)